

**IN THE LABOUR COURT OF SOUTH AFRICA**

**HELD AT DURBAN**

**Case Number: D295/98**

In the matter between

**N R Juggath**

Applicant

and

**R Shanker NO**

1<sup>st</sup> Respondent

**ABSA Insurance Company Ltd**

2<sup>nd</sup> Respondent

**JUDGMENT**

**LANDMAN J**

[1] The applicant, Mr N R Juggath, applies to have a decision of a commissioner of the Commission for Conciliation, Mediation and Arbitration (“the CCMA”), Mr Shanker, reviewed and set aside. Mr Shanker abides by the decision of this Court. However, the

employer, ABSA Insurance Company Ltd, opposes the application.

[2] This application is brought in terms of section 158(1)(g) of the Labour Relations Act 66 of 1995 (“the Act”), which empowers this Court to review the performance or purported performance of any function provided for in the Labour Relations Act or any act or omission of any person or body in terms of the Act, on any grounds that are permissible in law. For present purposes it is sufficient to accept that those grounds include the normal common law grounds for reviewing decisions of an administrative body.

[3] The applicant was employed by the second respondent. A complaint was made about his conduct and a disciplinary enquiry was convened to consider three counts relating to sexual harassment. The applicant admitted the first two counts, evidence was led, and he was found guilty on those two counts.

[4] He was dismissed on 2 November 1997. However, the dismissal was only to take effect on 31 December 1997. Mr Juggath was to be suspended until that time. In terms of s190 of the Act, his dismissal, therefore, took place on 31 December 1997. He was dissatisfied with this and complained to the CCMA.

[5] He referred the dispute to the CCMA on 20 February 1997. In his referral he said that the dispute was about an unfair dismissal because sexual harassment as defined by ABSA was not proved against him. Further, he argued that even if the charge of sexual

harassment was proved, in the circumstances of the case the sanction imposed was extremely harsh. The chairman, he says, could and should have considered the imposition of a less drastic sanction.

[6] The CCMA pointed out that this application was out of time. In consequence, the applicant filed a letter asking for condonation on three grounds. He says he could not lodge the dispute timeously for the following reasons:

- Ignorance of the requirement that I had to lodge the dispute within 30 days.
- I have also spent a great deal of time looking for other employment.
- My failure was not intentional and as this matter means a great deal to me and my family I would be most grateful if you would accept the late lodging of the dispute.

[7] These documents, together with a disciplinary appeal document issued by ABSA Bank and what appears to be an appeal against the sanction, were handed in and served before the commissioner (the last two documents do not appear in the bundle of documents which the commissioner has provided to this Court).

[8] The commissioner made a finding and dismissed the application for condonation. He first filed an *in limine* report and followed this up by a further three page finding on this

matter.

[9] Prima facie the commissioner misdirected himself as to the date of dismissal. He thought that the applicant was dismissed on 2 October 1997 and that his application was five months out of time. In fact, it was 20 days out of time. This is a factor which I must take into account. It is partly off-set by the fact that in the *in limine* report the correct dates are referred to.

[10] The commissioner had regard to the factors which must be taken into account in order to show whether there has been good cause for condonation. These factors are set out in the well-known case of **Melane v Santam Insurance Co. Ltd** 1962 (4) SA 532 (A).

[11] The commissioner has examined each of these factors separately and cumulatively and he finds that the applicant failed to show good cause as to why the application for condonation should be granted. He lists his reasons. They are:

- The delay in making an application since the appeal hearing was substantial but not adequately substantiated.
- The applicant was advised verbally and in writing by the employer to approach the CCMA should it wish to proceed with this matter.
- The applicant was assisted by a trade union and also had the benefit of legal advice (sic).

- The reason for the late referral was not due to a circumstance beyond the control of the applicant
- The applicant has failed to provide a reasonable explanation for the delay.
- The applicant has failed to convince me that it has any reasonable prospect of success after viewing the evidence mentioned above, it appears to me that the respondent had substantive grounds for dismissal. (sic)

[12] It is noteworthy that no arguments were raised and no case was made out before the commissioner as regards the prospects of success. Why was the sanction too harsh?

All that we find is that the commissioner noted:

The respondent advised that:

- The applicant had been charged and found guilty of sexual harassment.
- The applicant was aware of the company's disciplinary code and that such an offence is cited as a serious offence and would have resulted in dismissal.
- The applicant distributed sexually explicit material to female staff.
- After viewing the evidence it had no alternative but to terminate the employment relationship.

The respondent produced the above evidence at this hearing.

[13] Part of the material, to which I have not yet referred, which served before the applicant, was a colour brochure issued by the Score Adult Shop which depicted various products sold by that institution. The commissioner had regard to that and it influenced his decision.

[14]           The question is whether the commissioner, in declining to condone the late referral, has committed a gross irregularity or misdirected himself in such a manner that it amounts to a gross irregularity.

[15]   He has considered all the material and I can find nothing wrong with that. He has also considered the most important question: whether there is a reasonable prospect of success. On the material which served before him, I am unable to come to the conclusion that he has misdirected himself, and I find no reason to interfere with his decision.

[16]           In the circumstances this application is dismissed with costs.

**A A LANDMAN**

Judge of the Labour Court

DATE OF HEARING:   02 November 1998

DATE OF JUDGMENT: 02 November 1998

For the Applicant:       Mr O'Meara of Lloyd O'Meara Inc

For the Respondent:     Mr Maeso of Shepstone & Wylie